FILED
United States Court of Appeals
Tenth Circuit

May 23, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: LAWRENCE ROLLAND THIEL, Movant.	No. 16-1176 (D.C. Nos. 1:15-CV-00634-WJM & 1:12-CR-00406-WJM-1) (D. Colo.)

ORDER

Before **BRISCOE**, **GORSUCH**, and **BACHARACH**, Circuit Judges.

Movant Lawrence Rolland Thiel, a federal prisoner proceeding through counsel, seeks an order authorizing him to file a second or successive 28 U.S.C. § 2255 motion in the district court so he may assert a claim for relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015).[1] *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). Because Movant has made a prima facie showing that he satisfies the relevant conditions for authorization under § 2255(h)(2), we grant authorization.

Movant received a sentence enhanced under the sentencing guideline for unlawful receipt, possession, or transportation of firearms or ammunition, which is triggered by the defendant committing the offense "subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense," U.S.S.G. § 2K2.1(a)(4)(A). The term "crime of violence" in § 2K2.1(a)(4)(A) "has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2." *Id.* § 2K2.1 cmt. n.1.

[1] The Federal Public Defender for the Districts of Colorado and Wyoming is appointed to represent Lawrence Rolland Thiel pursuant to 18 U.S.C. § 3006A(a)(2)(B).

Movant alleges that his prior conviction was treated as a crime of violence by virtue of the residual clause in § 4B1.2, which encompasses crimes that "involve[] conduct that presents a serious potential risk of physical injury to another," *id.* § 4B1.2(a)(2). An identical clause in the Armed Career Criminal Act was invalidated in *Johnson* on the ground that it was unconstitutionally vague.

To obtain authorization, Movant must make a prima facie showing that his claim meets the gatekeeping requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C); *see Case v. Hatch*, 731 F.3d 1015, 1028–29 (10th Cir. 2013). A claim may be authorized under § 2255(h)(2) if it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Johnson* announced a new rule of constitutional law that was made retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). We held in *In re Encinias*, No. 16–8038, 2016 WL 1719323, at *2 (10th Cir. Apr. 29, 2016) (per curiam), that second or successive § 2255 motions that rely on *Johnson* to challenge § 4B1.2's definition of "crime of violence" for a prior conviction qualify for authorization under § 2255(h)(2). Under the same reasoning, second or successive § 2255 motions that rely on *Johnson* to challenge § 2K2.1(a)(4)(A)'s definition of "crime of violence"—which incorporates the definition in § 4B1.2—for a prior conviction qualify for authorization under 28 U.S.C. § 2255(h).

Accordingly, we grant Lawrence Rolland Thiel authorization to file a second or successive § 2255 motion in district court to raise a claim based on *Johnson v. United States*.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk